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Due Process Issues Arising from Local Government Meetings

I. INTRODUCTION: DEFINING OUR TERMS

The Due Process Clause of the Fifth Amendment to the United States Constitution states:

"No person shall be ...deprived of life, liberty, or property, without due process of law; ..."

These few words are the basis for a good deal of constitutional law. This paper explores a number of common circumstances in which the constitutional requirements of procedural due process [1] have implications for the manner in which local governments in California conduct meetings.

First, it is important to note that due process rights do not arise unless a person [2] has a protected interest. The text of the Clause divides the protected interest into three classes: the interest in life, a subject most often dealt with in the criminal context of capital punishment and not relevant here; liberty interests; and property interests.

The primary liberty interest that concerns local government is the interest in one's good reputation. This liberty interest is implicated in the personnel area, as disciplining or firing an employee for reasons that may bring them into disrepute implicates this interest. [3] It is also implicated in the law enforcement context, as where certain kinds of enforcement tactics can implicate liberty interests. Forbidding the sale of alcohol to "known drunkards" and posting photos of "known drunkards " identified by a police department, for example, was found to implicate a liberty interest. [4]

Property interests are most commonly relevant to local government decision-making, as California cities and counties regulate land use and all governments can affect personal property, such as money. Property interests are at stake in most of the issues addressed in this paper, although many (but not all) of the principles discussed can be applied to situations in which liberty interests are invoked, as well.

Another important concept basic to a discussion of the requirements of due process is the distinction between *adjudication* or *quasi-judicial acts*, on the one hand, and *legislation* or legislative acts, on the other. This distinction is critical because the requirements of due process are vastly different in these two contexts. As Justice Oliver Wendell Holmes put it early this century:

> "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or

> property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. " [5]

Thus, the "reasonable opportunity to be heard " on legislative matters is at the ballot box. On adjudicative matters, a person with a protected interest at stake, like an affected property owner, has a right to *individual* notice and an *individual* opportunity to be heard.

The distinction between quasi-judicial and legislative acts is relatively simple to state as a general matter, but difficult to apply in many cases. In general, the difference is this: legislation is the process of framing a rule or policy to be applied to a range of future cases. [6] A quasi-judicial act is one that applies pre-existing policies or rules to a specific fact situation. [7] Thus, the adoption of a zoning ordinance to govern land use in a community is a legislative act. The consideration of a conditional use permit or variance sought by a given landowner who wishes to use his or her property in a certain way is a quasi- judicial act.

When there is any doubt whether or not a matter is quasi-judicial such that procedural due process applies, you should consult your City Attorney or County Counsel. A good rule of thumb is this: when you know a decision will primarily affect only one or a few persons or businesses, you should consider the possibility that the matter is quasi-judicial and that procedural due process principles apply.

The basic rule of procedural due process is very simply stated: Before government deprives a person of a protected interest in liberty or property, that person must be given reasonable notice of the action and a reasonable opportunity to be heard [8] In very limited circumstances, this notice and opportunity can be given after the interest is affected; in most cases, however, notice and an opportunity for hearing must be given before government action is taken. In many situations common to local government action, the necessary notice and hearing can be quite informal. For a parking ticket, for example, the notice can be the ticket itself and the hearing can be an opportunity to write a letter challenging the ticket.

Due process sets a floor on the procedures required of local government action. Its requirements are a bare minimum and state laws or local ordinances often require more elaborate procedure than would due process. For example, the Planning and Zoning Law has very specific notice and hearing procedures for the adoption or amendment of a general or specific plan, [9] the adoption or amendment of a zoning ordinance [10] or the granting of a conditional use or other permit. [11]

Thus, the procedures required for a particular action depend on whether the action is legislative or quasi-judicial in character and must include the constitutional requirements of (i) reasonable notice and (ii) a reasonable opportunity to be heard as well as (iii) any additional procedures required by state or federal law or by local ordinance or policy.

II. DECISION-MAKER ISSUES

One of the fundamental requirements of due process is that a "person who has a protected interest in property or liberty at stake must have a hearing before an impartial decision-maker. This seems like a rather obvious aspect of fairness, but it raises many issues for local government.

A. "HE WHO HEARS, MUST DECIDE" [12]

This quote from an earlier day reflects a basic idea of fairness, and of due process: If a decision is required to be based on the evidence produced at a hearing, the person who decides a matter must hear the evidence. It would be more accurately stated as "he or she who decides, must hear, II but that is not how the quote has come down to us. This has a few practical implications for local governments.

First, local government are sometimes required to make formal findings that the decision-maker has reviewed the evidence. An example is the California Environmental Quality Act (CEQA), which requires the body which certifies an environmental impact report (EIR), often the City Councilor Board of Supervisors, to find that the members of that body have reviewed the EIR. [13]

Second, when a member of a board or commission misses one of a number of meetings at which a matter is considered, it is necessary that he or she review the tape or other record of the meeting he or she missed before voting on the matter. It is good practice for such a person to state on the record of the meeting at which the decision is made that he or she has done so.

The third issue arises when a particular decision is heard by one body, but decided by another. For example, many personnel ordinances permit a hearing officer to take testimony and, perhaps, to recommend a decision to a decision-maker. In another example, a decision by one body can be appealed to another for review on the record, rather than for a “de novo" hearing at which the lower body' s proceeding is only some of the evidence to be considered, as is most common in local land use regulation. In these cases, the decision- maker is also required to review the evidence adduced below and it is advisable for the decision-maker to note for the record, or to formally find, that he or she has done so. [14]

B. BIAS AND RELATED ISSUES [15]

If a decision-maker is "biased," in the legal sense, a hearing before him or her would violate due process because the decision-maker cannot reasonably be expected to render a decision on the evidence because his or her mind is wholly made up before the decision is made or he or she is unduly swayed by some interest or prejudice with respect to the matter. It is very easy to charge someone with "bias" and, in political life, this charge is often heard. The law requires a good deal more than an opinionated point of view, however. Three cases can shed light on how the law defines disqualifying bias.

The leading California case *is Andrews v. Agricultural Labor Relations Board* (ALRB) [16]. The case arose from events which took place in 1975 and 1976, early in Jerry Brown's first term as Governor and during a time of substantial controversy in farm labor relations. The United Farm Workers charged a farm employer with violating workers' rights to unionize and the ALRB's general counsel initiated an administrative proceeding against the employer.

The general counsel appointed an outside attorney as the hearing officer to decide the matter. That attorney was employed by a public interest law firm in San Francisco which represented labor unions and employees in discrimination and other cases. The attorney personally handled race discrimination cases against employers, but did not handle the firm's union cases and, when challenged by the grower's attorneys, stated" A race discrimination case involving employment is not the same thing as a labor union dispute. ..." [17]
Justice Mosk, writing for the California Supreme Court, stated:

> "The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him. ...[T]he word bias refers to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.
>
> Not only would it be extraordinary to find a judicial officer who is totally without a thought on all issues, the discovery of such a rare intellectual eunuch would suggest an adverse reflection on his qualifications. ...It would be untenable for this court to insist upon selection only of [hearing officers] who have never thought about or expressed an opinion on the broad social, economic or legal issues that inherently underlie a labor dispute." [18]

Thus neither a prejudgment about the general issues in a case nor an" appearance of bias" is legally sufficient to require a decision-maker to abstain. Instead, it must be shown that the decision-maker has a prejudice against a person affected by the decision and that the prejudice is sufficient to impair the decision-maker's ability to decide the matter on appropriate grounds [19] The "subjective charge of an appearance of bias alone does not suffice to demonstrate that a [decision-maker] is infected with actual bias" and must therefore be disqualified. [20]

A U. S. Supreme Court decision which cuts the other way is *Ward v. Monroeville.* [21] In this case, the U. S. Supreme Court ruled that the petitioner's due process rights were violated when he was convicted of two traffic offenses and fined $50 in the "Mayor's Court" where the Mayor of the Village of Monroeville was the judicial officer. The Court found that the Mayor could not be impartial where the fines he imposed went into the Village treasury and such fines constituted as much as half of the Village budget. While the Mayor had no personal financial stake in the outcome of the traffic case, his other responsibilities

created a sufficient risk that he would render a decision on inappropriate grounds that due process required a different decision-maker. [22]

A recent decision concerning bias in the context of the common law doctrine regarding conflicts of interest is Clark v. City of Hermosa Beach. [23] This case demonstrates that, even where a Council member has no financial interest in a decision and no conflict under the Political Reform Act, [24] disqualification for bias can be required under California's common law requirement of a fair hearing and under the common law conflict of interest doctrine.

In 1982, Phoenix residents Douglas and Cheryl Clark bought a duplex in Hermosa Beach for use as a second home. In 1989, the Clarks proposed to demolish the duplex and replace it with a 2-unit condominium that reached the 35-foot height limit and 65% lot coverage permitted by the City's R-3 zoning standards. They applied for a conditional use permit, a precise development permit, and a tentative parcel map. The Planning Commission approved the project.

A tenant of a nearby apartment (who would later serve on the City Council) objected to the approval and obtained signatures on five petitions that protested the approvals "on the basis that the construction of the building will adversely affect the views of neighboring homes. " The council member-to-be also wrote a letter to the City Council objecting to the approvals on the ground that the City's 35-foot height limit was too high. The council member-to-be sought a waiver of the City's appeal fee and, when this was denied, did not pursue the appeal further. He joined the City Council after the 1990 election.

The City changed its setback requirements before the Clarks pulled a building permit. As a result, the Clarks modestly revised their plans and sought new approvals in January 1992. The Planning Commission unanimously approved the revised proposal but, in light of testimony opposing the 35-foot height limit, recommended the City Council consider initiating a zoning moratorium on construction in R-3 zones to permit reconsideration of the height limit. The Council debated that issue and voted 3-2 to impose the moratorium, one vote short of the four required [25]. The Council then directed the Planning Commission to initiate hearings to lower the height limit to 30 feet.

Neighbors appealed the Planning Commission's second approval of the project. When the matter was heard, a former Council member questioned participation by the Council member who had objected to the 1989 approval. The City Attorney advised the Council that, because the Council member did not own his home, but rented it on a month-to-month basis, he had no conflict of interest under the Political Reform Act. The City Attorney also concluded that the Council member's opposition to the earlier project did not create disqualifying bias.

After hearing the appeal, the Council voted 3-2 to grant the appeal and to overturn the Planning Commission's approval of the project. The majority included the Council member who had opposed the earlier project.

The Clarks filed suit seeking a writ of mandate to overturn the City Council's decision and seeking damages for a violation of their federal civil rights [26]. The Superior Court granted the writ and ordered the City to reinstate the Planning Commission's approval of the Clarks' applications. In the subsequent trial of the civil rights claim, the Clarks testified that there had been personal animosity between themselves and the Council member who opposed their project in 1989 and voted against it in 1992:

> "according to Mr. Clark, it was fairly common for [the council member] to run by their windows and yell 'loud, obnoxious noises in the morning. ' On one occasion at the beach, [the council member] and some of his friends were 'horsing around' near the Clarks' children. Concerned for the children's safety, Mrs. Clark asked [the council member] to stop or go elsewhere. [The council member] refused and began mocking her. Further, Mrs. Clark testified that on a Friday night, [the council member] 'walked over to our house and urinated on the house and in the planter. ' She called the police, who arrived promptly and directed [the council member] to his apartment. The local press (the Daily Breeze) ran an article on this incident and quoted [the council member] as saying that Mrs. Clark wanted to see him urinate. At trial, [the council member] stated that his comments in the newspaper had been taken out of context, and he denied having urinated in the Clarks' property. However, the trial court expressly found that [the council member] engaged in such conduct. " [27]

The Court of Appeal concluded that the Clarks had been denied a fair hearing but nonetheless reversed the trial court. First, the court concluded that the proper The Court of Appeal concluded that the Clarks had been denied a fair hearing but remedy for a violation of the right to a fair hearing is a writ compelling a new hearing, not a writ compelling a particular decision. Second, the court found no civil rights violation, noting that there is no protected property interest in an application for a land use permit. For our present purposes, the relevant point is the court's conclusion that the council member should have disqualified him to comply with the common law conflict of interest doctrine, even though he had no financial interest in the decision requiring abstention under the Fair Political Practices Act:

> "Under the common law, [the] Council member ...had a conflict of interest in voting on the Clarks' project. In denying the requested permits, the Council majority (which included [the council member]) found that the height and lot coverage of the proposed structure would interfere with the use or enjoyment of other property in the area. Also in opposing the Clarks' 1989 application, {the council member] stated his belief that the project would 'further constrict the view of the ocean from homes that are located behind .the lot. ' Because [the council member] lived one block inland of the Clarks, he stood to benefit personally by voting against the Clarks project. It is irrelevant that [the council member] did not own his residence; an interest in preserving his ocean view was of such importance to him that it could have influenced his judgment. Of course a public official may express opinions on subjects of community concern (e.g., the height of new construction) without tainting his vote on such matters should they come before him. Here, [the council

member's] conflict of interest arose, not because of his general opposition to 35 foot buildings, but because the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence. In addition, [the council member's] personal animosity toward the Clarks contributed to his conflict of interest; he was not a disinterested, unbiased decision-maker." [28]

Thus, both due process and the common law conflict of interest doctrine disqualify a decision-maker who has an appreciable, personal stake in the outcome of a matter –either .the ocean view from the decision-maker's apartment or the Mayor's interest in money for the town budget. These rules do not require the disqualification of a decision-maker merely because he or she has stated an opinion on issues of public policy that will arise in the matter at hand. Thus, the hearing officer who represented Mexican-Americans in employment disputes was not disqualified from hearing a dispute between the UFW and a farm employer and the Hermosa Beach council member would not have been disqualified solely for opposing 35-foot-tall buildings.

Practical advice can be drawn from these cases to protect decisions from attack and decision-makers from criticism: .A void statements before the close of a hearing that suggest your mind is made up. Such a statement can be made outside the hearing room, as to the press; before the Planning Commission on a matter which might be appealed, [29] or during the hearing itself before all the evidence is heard, as during questions to staff.

Planning Commissioners elected to a City Councilor Board of Supervisors may wish to abstain on appeals of actions they have voted upon while serving on the Commission.

If you think you cannot be fair, don't participate, even if non-participation is not legally required.

Month-to-month tenants may choose to abstain on matters where abstention would be required if they owned their homes. Obviously, tenants are not required to abstain on decisions affecting property near their homes, however, the conflict rules for home owners are so well known in some communities that they create an expectation that decision-makers will abstain. Moreover, as the *Clark* case shows, sometimes the effect on your home can trigger a duty to abstain under common law rules even if you don't own it.

Avoid the appearance of bias. This is simplistic advice, but if your judgment is fairly questioned, you can save yourself and your agency criticism (and, sometimes, legal fees) simply by abstaining. If the heat will be high, consider whether participation is worth the possible cost. Because the bias rule and the common law doctrine against conflicts of interest are judge-made law, the law develops in court cases *after the fact*. Thus, it is not possible for your legal counsel to predict with complete accuracy when a judge will or will not view your conduct as unacceptable under these doctrines.

Do participate in community debate about policy; don't pre-commit to decisions involving particular persons or sites if a quasi-judicial application may soon be before you.

C. SOME SPECIFIC BIAS RULES

Litigation has clarified application of the doctrine of bias under the due process clause and the fair hearing and common law conflict of interest doctrines in some important cases.

Campaign contributions do not disqualify a decisionmaker. Absent a specific statute or a local ordinance, [30] elected officials may participate in decisions which affect their campaign contributors. [31] Appointed officials, however, may not. [32]. This commonly applies to a Planning Commissioner who remains on the Commission after an unsuccessful run for City Council or the Board of Supervisors.

Campaign statements do not disqualify a successful candidate from voting on matters which come before him or her after the election. [33]

The decision-maker cannot be the appellant. [34]. Thus, an ordinance which authorizes a Council- or Board member to bring the decision of a Planning Commission or other subordinate board before the Councilor Board of Supervisors for review should be stated in terms of a "request for review" rather than the "appeal of an aggrieved person." This latter formulation commonly appeared in zoning ordinances prior to the decision in *Cohan v. City of Thousand Oaks* which found unacceptable bias from a Council member hearing a matter he had himself "appealed. " [35]

III. EVIDENCE ISSUES

Due process and fair hearing requirements also require decisions to be based on credible evidence presented at the hearing. A number of specific rules derive from this basic rule.

A. SUBSTANTIAL EVIDENCE

When an agency makes a quasi-judicial decision after a hearing, that decision is required to be based on "substantial evidence in light of the whole record. " [36]. Much has been written on what these few words mean. For present purposes, however, only a general point need be made. The evidence which may support an administrative decision need not be the kind of evidence which would be admitted by a court. The formal rules of evidence do not apply [37]. On the other hand, due process and fundamental fairness do require decisions to be supported by at least some credible evidence in the record.

The U.S. Supreme Court has defined substantial evidence as: "more than a mere scintilla" and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” [38]

B. EX PARTE COMMUNICATIONS, SITE VISITS, AND OFF-THE RECORD INFORMATION

Due process requires that a person affected by a decision know the evidence on which the decision is to be based and have an opportunity to comment on it and, if need be, to

rebut it. When one party to a dispute contacts a decision -maker outside the presence of another, that contact is known as an "ex parte" communication. [39]. While ex parte communications are forbidden in more formal contexts, like some formal adjudications by federal agencies,.[40] they are a fact of life in local government and are not illegal in and of themselves.[41] When a whole neighborhood is up in arms about a land use appeal, chances are some one will talk to a Council member about it outside a Council meeting.

Similar issues arise when decision-makers glean relevant information about a matter outside the hearing, either by chance, research, or on a site visit.

Ex parte communications, while sometimes unavoidable, are nonetheless risky. First, these off-the-record discussions can lead to the fact or appearance of prejudgment ("Don't worry! There's no way I'll vote for that CUP! "). Second, off-the-record discussions which later come to light can create an appearance of unfairness. Third, the decision must be based on the evidence adduced at the hearing and to which the affected parties had opportunity to respond. [42.] While off-the-record evidence can be placed on the record, human psychology is such that we sometimes absorb and act on information without being conscious that we are doing so. Thus, relying on decision-makers to note for the record all the off-the-record information which may affect their decisions and to which the affected parties have a right to respond may be psychologically unrealistic.

Further, it is important that a person affected by a decision have an opportunity to comment on the basis of a proposed decision. In the Clark case discussed above, the Court I: found a violation of the fair hearing requirement in that Council members raised objections to the proposed condominium project on two theories which had not been raised prior to the close of the hearing -lot coverage and open space requirements. [43] Effectively, the Clarks never had a hearing on these issues because they were not raised until after the hearing was closed.

Some practical tips:

It is best to avoid ex parte communications on sensitive or controversial matters. Elected officials can tell constituents "The City Attorney tells me that I cannot decide this case on anything I hear outside the Council meeting. If you really want our opinion to count you should come to the meeting, or send us a letter. " This is not always politically feasible, but when it is, this tactic can get you home from the market before your ice cream melts!

If you receive relevant information about a matter at a site visit or otherwise outside the hearing and you intend to rely on it, you should state those facts before the close of the hearing. This allows the affected parties to react to the information you have heard, give you relevant I background and, sometimes, correct erroneous information.

It may be best to routinely identify ex parte contacts and off-the-record information received about matters, so that constituents get the message that you have to disclose ex parte draws attention and creates controversy. This is not legally

required, but it is the practice of some agencies which have relatively formal contacts, and so that a decision to disclose is not so unusual that it hearing styles.

If a decision is to be based on a rationale that was not raised in the staff report or otherwise put in issue before the hearing closes, affected persons should be given an opportunity to comment before the decision is made. For agencies which prepare a resolution of decision for adoption at a meeting subsequent to the meeting at which the hearing occurred, this can easily be accomplished. The agency need only allow public comment on the form of the resolution before it is adopted.

C. PUBLIC OPPOSITION AS EVIDENCE

Quasi-judicial decisions must be based on credible evidence of facts relevant to the decision to be made. The relevant facts are defined by the rule or policy to be applied. For example, if issuance of a conditional use permit requires a finding that a proposed structure complies with the zoning ordinance, and the zoning ordinance imposes a 35-foot height limit, " the height of the proposed structure is a relevant fact.

Few rules of decision make the fact of public opposition relevant to the decision. If the rule to be applied states that an application must be denied if the proposed structure is greater than 35 feet, it will not aid a decision to note that affected neighbors would prefer the structure were limited to 30 feet.

Public opposition is always relevant as a political matter, but reliance on it is often an invitation to litigation.

At one time, the existence of public controversy about a project was a basis to conclude that the California Environmental Quality Act (CEQA) required the preparation of an environmental impact report (EIR) rather than a negative declaration for a project. [44]. The Legislature amended CEQA to reject this rule. [45]. Thus, even in this context, the mere fact of public opposition or controversy is not relevant in a quasi-adjudicatory decision. However, the facts and issues identified by public comment can often provide a basis for denying a permit or other decision, especially given the relatively broad discretion conveyed by most zoning standards and other local rules of decision.

IV. A REASONABLE OPPORTUNITY TO BE HEARD

Due process does not require that a person whose interests are affected by a decision *actually* be heard or be heard at whatever length they desire. Instead, affected persons are entitled to a reasonable *opportunity* to be heard. This simple rule raises a number of practical issues:

A. HOW MUCH TIME? Many local governments have rules of procedure which give a fixed amount of time to each speaker, such as 3 or 5 minutes. Others allow the Mayor or Chairperson to set *ad hoc* time limits when a great many persons wish to speak.

These rules must be applied with care, however, to avoid a due process violation. How must time to speak is reasonable in a given matter will turn on what is at stake. A complex land use application involving environmental clean-up of a site, scientific disputes, complicated mitigation measures, etc. will require more time to present than a simple set back variance for a bedroom addition.

Rigid insistence on a 3-minute rule can violate due process and fair hearing requirements. In addition, giving an applicant the same 3 minutes afforded to his two dozen opponents can result in 3 minutes for the "yes" side and an hour for the "no" side. There can be no hard and fast rules. here, but the. decision maker should ensure that a reasonable opportunity to present each side of a case is granted. ,

B. FAILURE TO APPEAR. The mere fact that an interested person fails to appear at a hearing does not require the matter to be continued. If notice was properly given, the agency can move forward and need not re-open a matter to satisfy someone who failed to attend.

C. REQUESTS FOR CONTINUANCE. In general, there is no duty to continue a hearing to another date at the request of an interested party. However, there are occasions when this is appropriate. First, if there is any question whether notice was properly given, it is best to re-notice the hearing for a later time. Second, if an interested "party makes a persuasive case that more time is needed to prepare a case, either because of the complexity of the issues or some element of surprise in the matters discussed, fairness may require a continuance. If one continuance has been granted at an applicant's request, there is more latitude to deny a subsequent request from the applicant.

D. PAPER HEARINGS AND WRITTEN TESTIMONY. When relatively minor interests are at stake, such as the revocation of a license for a burglar alarm or the imposition of a parking fine, a "reasonable opportunity to be heard" can be provided via a paper hearing, in which the affected person is required to make their statement in writing. This is not permissible for more serious matters, such as those which interfere with a, person's ability to make a livelihood, as in the seizure of their means of making a living (like a taxicab) or termination of employment.

It is almost always a good idea to *permit* (as opposed to require) written submissions. First, this can shorten the amount of oral testimony received. Second, it can afford an opportunity to participate to those who cannot easily attend the hearing. Saying, "you are welcome to contribute additional information in writing" can be a good way to cut off someone who has spoken too long without risking later argument that some critical evidence was excluded.

E. OPPORTUNITY TO RESPOND TO THE EVIDENCE. As discussed above, a person affected by a decision with a protected property or liberty interest is entitled to respond to the evidence on which the agency intends to rely. For this reason, it is good practice to permit the proponent of an action an opportunity to rebut statements made by project opponents, either orally or in writing.

V. CONCLUSION

When a government decision will affect a protected property or liberty interest due process must be given. This requires only reasonable notice and a reasonable opportunity to be heard before the decision is made. Fundamental fairness is the goal of this requirement and, in most circumstances, acting in a way that appears fundamentally fair to reasonable people will suffice. When a matter involves significant controversy, however, sometimes more is required and in those circumstances, it is wise to consult with legal counsel.

DUE PROCESS: DEFINING OUR TERMS

PROTECTED INTERESTS:

Life

Liberty

Property

ADJUDICATION VS. LEGISLATION

THE BASIC RULE OF DUE PROCESS:

Before government takes an action that affects a protected interest, the holder of that interest is entitled to reasonable notice and a reasonable opportunity to be heard.

DECISION MAKER ISSUES

Bias and Related Concepts

Due Process –Bias

Common Law Conflict of Interest Doctrine

Common Law Fair Hearing Requirement

DECISION MAKER ISSUES

Bias and Related Concepts

Andrews v. Agricultural Labor Relations Board

Hearing Officer is a Chicano Attorney employed at San Francisco's Public Advocates, Inc.

Public Advocates previously brought labor actions for Mexican-American farmworkers

Hearing Officer has just completed an employment rights suit against K-Mart for a class of Mexican-American workers

Preconceived views on the general policy issues related to a matter does not create disqualifying bias

Disqualifying bias requires:

prejudice against a person affected by the decision

sufficient to impair the decision-maker's ability to decide the matter on appropriate grounds

DECISION MAKER ISSUES

Bias and Related Concepts

Ward v. Monroeville

Ohio law establishes "Mayor's Court" for minor traffic offense

Decision-Maker is the Village Mayor

Traffic fines constitute up to 1/2 of village budget

DECISION -MAKER ISSUES

Bias and Related Concepts

C**lark v. City of Hermosa Beach**

Council member-to-be rents an ocean-facing apartment one block away

Council member-to-be opposes project, gathers signatures on 5 petitions objecting to 35-foot buildings

Council member-to-be files appeal, but does not proceed when City refuses to waive appeal fee

In 1992 Clarks reapply, after failing to use earlier permits

Council votes 3-2 to deny Clarks' project on grounds of view impairment, lot coverage, and open space requirements, raising latter two points after close of public hearing

Court of Appeal found Council member's participation violated the common law doctrine against conflicts of interest:

> "Because [the council member] lived one block inland of the Clarks, he stood to benefit personally by voting against the Clarks project. ...Of course a public official may express opinions on subjects of community concern (e.g., the height of new construction) without tainting his vote on such matters should they come before him. ...In addition, [the council member's] personal animosity toward the Clarks contributed to his conflict of interest; he was not a disinterested, unbiased decisionmaker."

TIPS FOR DECISION -MAKERS

Avoid statements before the close of a hearing that suggest your mind is made up.

Councilmembers may wish to abstain on appeals of actions they voted upon while on the Planning Commission

If you think you cannot be fair, don't participate

Tenants may wish to abstain if abstention would be required if they were home-owners

A void the appearance of bias

Do participate in community debate about policy; don't pre-commit to a decision on a quasi- judicial application

DECISION-MAKER ISSUES

Some Specific Bias- Related Rules

Campaign contributions do not disqualify an elected decision-maker

Campaign statements do not typically create disqualifying bias

The decision-maker cannot be the appellant

EVIDENCE ISSUES

Off -the- Record Information

Some Practical Tips

Avoid ex-parte communications on controversial matters

Put off-the-record information on the record

Consider routinely identifying ex parte contacts and off-the-record information

Don't raise new issues after the hearing is closed

WHAT PROCESS IS DUE?

How much time is "'reasonable"?

Non-attendance does not require continuance

Requests for continuances

Paper hearings

Written testimony

Opportunity to rebut

1 The courts interpret the Due Process Clause to impose two separate requirements on government. In its procedural aspect, the clause requires reasonable notice and an opportunity to be heard before a person is deprived of "life, liberty or property. " *Mathews v. Eldredge*. 425 U.S. 319 (1976). In its so-called "substantive" aspect, the Clause imposes limits on government power as necessary to protect fundamental rights. *E.g. Roe v. Wade*. 410 U.S. 113 (1973). This paper focuses only on the procedural aspect of the Due Process Clause.

2 Local governments are not themselves "persons " with rights to due process, although they can assert the due process rights of their residents in some circumstances. Compare *San Diego Unified Port District v. Gianturco*. 457 F. Supp. 283 (S.D. Cal. 1978), affirmed 651 F.2d 1306 (9th Cir. 1981) (14th amendment protections do not apply to political subdivisions) with *Santiago Collazo v. Acosta*. 721 F.Supp. 385 (D. Puerto Rico 1989) (city may assert constitutional rights of its residents).

3. *Murden v. County of Sacramento*. 160 Cal.App.3d 302, 307-08 (1984); *Holmes v. District Attorney*. 99 Daily Journal DAR 295, 297 (filed December 16, 1998; ordered published January 8, 1999).

4 *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

5 *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

6 *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal.3d 511 (1980).

7. *Id.*

8. *Mathews v. Eldredge*, 427 U.S. 319 (1976).

9. Government Code Sections 65350-65362.

10. Government Code Sections 65853-65857.

11. Government Code Sections 65901, 65905.

12. *E.g., McMinnville Freight Line, Inc. v. Atkins*, 514 S. W .2d 725, 727 (Tenn. S. Ct. 1974); see also *Morgan v. United States*, 298 U .S. 468, 481 (1936).

13. *City of Carmel-by-the-Sea v. Board of Supervisors*, 71 Cal.App.3d 84 (1977).

14. *E.g., Morgan v. United States*, 298 U.S. 468, 481 (1936).

15. "Bias" is a doctrine derived from the due process requirement for an impartial decision-maker and from California's common law "fair hearing requirement." Related notions arise from the common law conflicts of interest doctrine and the substantive due process requirement. These distinctions are critical in litigation, but not for the intended lay audience of this paper and, thus, are treated as one concept in the following discussion.

16. 28 Cal.3d 781 (1981).

17. *Id* at 786.

18. *Id* at 790-91 (internal quotation and citations omitted).

19. *Id.* at 792.

20. *Id at* 793, n.5.

21. 409 U.S. 57 (1972).

22. Under California law, the "common law doctrine against conflicts of interests" and the rule forbidding one person to hold two "incompatible offices" will often produce results similar to that in Ward.

23. 48 Cal.App.4th 1152 (1996).

24. Government Code Sections 87100 et seq

25. Government Code Section 65858.

26. The complaint sought damages and attorneys fees under 42 U.S.C. Sections 1983 and 1988.

27. *Id* 1167, n.12.

28. *Id* 1172-73 (citations and footnotes omitted).

29. Some Council members avoid attendance at Planning Commission meetings to avoid any suggestion that; by word, facial expression or body language; they have influenced the Commission or otherwise signaled a "mind made up" on a matter which might be appealed to the Council. While avoiding Planning Commission meetings is not legally required, it does prevent criticism of this sort.

30. An example of such a rule is Public Utilities Code Section 130051.20, which applies to directors of the Metropolitan Transportation Authority (MTA). Public Utilities Code Section 132410(b)(2)(B) is a similar provision applicable to members of the Pasadena Metro Blue Line Construction Authority.
31. Woodland Hills Residents Association v. City Council, 26 Cal.3d 938 (1980).

32. 2 CCR Sections 18438-18438.8 (duty to abstain if contributor of $250 or more within past 12 months affected by decision).

33. City of Fairfield v. Superior Court, 14 Cal.3d 768, 781 (1975).

34. Cohan v. Thousand Oaks, 30 Cal.App.4th 547 (1994).

35. *Id.*

36. *E.g.,* Code of Civil Procedure Section 1094.5 (c)

37. *Desert Turf Club v. Board of Supervisor*s 141 Cal.App.2d 446, 455 (1956).

38. Consolidated Edison v. NLRB, 305 U .S. 197, 229 (1938); *Richardson v. Perales*, 402 U.S. 389,401 (1971).

39. "Ex parte" means "on behalf or' and implies that a comment is made on the part of one party to a dispute out of the hearing of the other parties.

40. 5 U.S.C. Section 557(d) (provision of Federal Administrative Procedures Act prohibiting ex parte communications 'relevant to the merits of the proceeding' between an 'interested person' and the decision maker).

41. *City of Fairfield v. Superior Court*, 14 Cal.3d 768 (1975).

42. Desert *Turf Club v. Board of Supervisors*, 141 Cal.App.2d 446, 455 (1956).

43. *Clark v. City of Hermosa Beach,* 48 Cal.App.4th 1152, 1173 (1996).

44. *E.g., No Oil, Inc, v. City of Los Angeles*, 13 Cal.3d 68, 85 (1974); *Brentwood Ass 'n for No Drilling, Inc. v, City of Los Angeles*, 134 Cal.App.3d 491, 505 (1982).

45. Public Resources Code Section 21082.2 adopted 1984.